STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 23, 2009
v	No. 284822 Kent Circuit Court
HENRY LAMONT CLARK, Defendant-Appellant.	LC No. 07-009622-FH

Before: Owens, P.J., and Servitto, and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his conviction, following a jury trial, of one count of first-degree retail fraud, MCL 750.356c. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was alleged to have stolen a vacuum cleaner valued in excess of $500 from a Linens 'N Things store. Tracy Orcutt worked as a cashier at the Linens 'N Things on the day in question. She testified that sometime after 9:00 a.m. she noticed the defendant walking around the store. She further testified that sometime between the store's opening and 10:00 a.m. the defendant walked out of the store's entrance doors with a Dyson vacuum cleaner, without paying for the item. While Orcutt acknowledged that she did not see the defendant's face as he exited the store, she recognized him because she had observed him at length when he entered the store and walked around. Orcutt testified that the store's alarm sensor was not activated when defendant left with the vacuum cleaner. Orcutt reported the theft to the store manager and an inventory was conducted. Jayne Kennedy, the store manager, discovered that a Dyson vacuum cleaner was indeed missing. In addition, Kennedy and another sales manager testified that they saw defendant with a Dyson vacuum cleaner in his shopping cart.

Between 4:00 p.m. and 5:00 p.m. on the same day, defendant returned to the store and was observed at the Dyson vacuum cleaner display. Another sales associate secured the license plate number of the SUV believed to be defendant's transportation. Defendant left the store and the police were notified. Police stopped the SUV and defendant was found to be the driver. Defendant was later identified by three store employees in a corporeal lineup.

Defendant argues that his conviction should be vacated because the prosecution failed to present sufficient evidence that he committed first-degree retail fraud. We review a claim of insufficiency of the evidence de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d

105 (2001). The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998).

Defendant first maintains that the prosecutor failed to show that anything was stolen from the store. MCL 750.356d(1) provides, in part, as follows:

> (1) A person who does any of the following in a store or in its immediate vicinity is guilty of retail fraud in the second degree . . .
>
> * * *
>
> (b) While a store is open to the public, steals property of the store that is offered for sale at a price of $200.00 or more but less than $1,000.00.

MCL 750.356c(2) elevates a retail fraud in the second degree by providing that:

> (2) A person who violates section 356d(1) and who has 1 or more prior convictions for committing or attempting to commit an offense under this section or section 218, 356, 356d(1), or 360 is guilty of retail fraud in the first degree[1].

While defendant argues that if a vacuum cleaner had in fact been stolen, the store's anti-theft sensors would have activated the store's alarm, whether or not a crime occurred has little to do with the activation of an alarm. An inventory conducted after defendant left the store revealed that a Dyson vacuum cleaner was missing from the store. Moreover, the store manager testified that while the boxes of all vacuum cleaners should have anti-theft sensors, the entire inventory is not always protected with the sensors. The fact that the alarm did not activate can be explained by inferring that the anti-theft sensor was never placed on the box or that the sensor had been removed.

Defendant also maintains that there is no evidence that anyone saw him leave the store with the vacuum cleaner, noting that the cashier who witnessed an individual leaving the store with the Dyson vacuum cleaner admitted that she did not see his face. However, the testimony was clear that Orcutt was able to identify defendant as the perpetrator because she had observed him at length before he exited the store. Several other witnesses also testified that defendant was in the store on that day handling the vacuum cleaners. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

Where, as here, defendant was not only identified as being the individual who placed a vacuum in his cart without paying for the same and left the store, but was identified by several other witnesses as an individual being in the vicinity of the vacuums and an inventory revealed

[1] Defense counsel and the prosecutor stipulated that defendant had a prior retail fraud conviction. The jury instructions were modified to prevent the jury from knowing about the prior conviction.

that a vacuum was missing after defendant left the store, there was sufficient evidence to support defendant's conviction.

Moreover, defendant's arguments all involve the weight of the evidence and the credibility of the witnesses. This Court will not interfere with the factfinder's role in determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended on other grounds 441 Mich 1202 (1992); *People v Jackson*, 178 Mich App 62, 64-65; 443 NW2d 423 (1989).

Defendant next argues that the jury's verdict was against the great weight of the evidence. Defendant preserved this argument by moving for a new trial. We review for an abuse of discretion a trial court's grant or denial of a new trial on the ground that the verdict was against the great weight of the evidence. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). A grant of a new trial because the verdict was against the great weight of the evidence is disfavored, and the jury's verdict should not be set aside if there is competent evidence to support it. *Ellswoth v Hotel Corp*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

Defendant advances the same arguments that the verdict was against the great weight of the evidence as he does concerning the sufficiency of the evidence. For the reasons set forth above, this argument is also without merit. There are no exceptional circumstances that would warrant taking weight of the evidence and credibility determinations away from the trier of fact. *Lemmon*, *supra* at 642-643. There was substantial competent evidence to support the jury verdict and the trial court did not abuse its discretion in denying the motion for a new trial.

Affirmed.

/s/ Donald S. Owens
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher